Wyndham Palmas del Mar Resort and Villas *and* Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, HEREIU, AFL–CIO. Case 24–CA–7798

July 13, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBER LIEBMAN AND WALSH

The issue presented in this case is whether the Respondent should be allowed to withdraw recognition from the Union on the basis of an antiunion petition signed by employees during the 60-day notice-posting period prescribed by a settlement agreement resolving charges alleging serious unfair labor practices.[1] For the reasons set forth below, we conclude that, under established Board precedent, the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

HEPC Palmas, Inc., a Texas corporation authorized to do business in the Commonwealth of Puerto Rico and operating under the trade name of Wyndham Palmas del Mar Resort and Villas, provides resort hotel, restaurant, and related services at a facility at Humacao, Puerto Rico. During the 12-month period preceding issuance of the complaint, the Respondent, in the normal course and conduct of its business operations, derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000 directly from outside the Commonwealth of Puerto Rico.

The General Counsel alleges in the complaint, the Respondent's answer admits, and we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

The Union was certified in 1995 as the bargaining representative of a unit of employees employed by a predecessor employer. On February 11, 1997,[2] the Respondent recognized the Union and began negotiations for a collective-bargaining agreement.[3] Between February 11 and August 26, the parties held 12 bargaining sessions.

[1] On a charge filed September 19, 1997, by Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, HEREIU, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint October 31, 1997, against Wyndham Palmas del Mar Resort and Villas (the Respondent), alleging that it violated Sec. 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

On February 18, 1998, the General Counsel, the Respondent, and the Union filed with the Board a stipulation of facts and a motion to transfer this case to the Board. The parties agreed that the charge, the complaint, the answer to the complaint, and the stipulation, including attached exhibits, shall constitute the entire record in this proceeding and that no oral testimony is necessary or desired. The parties further waived a hearing before an administrative law judge and the issuance of an administrative law judge's decision.

On May 11, 1998, the Board issued an order conditionally approving the stipulation and transferring the proceeding to the Board for issuance of a Decision and Order, subject to the parties' stipulating to a precise description of the appropriate bargaining unit. Thereafter, on June 29, 1998, pursuant to the Board's Order, the General Counsel, the Respondent, and the Union filed a stipulation concerning the unit description. The General Counsel and the Respondent each filed briefs.

[2] All dates hereafter are in 1997, unless otherwise specified.

[3] The stipulated unit appropriate for bargaining is:

> INCLUDED: All regular fulltime and regular part-time employees in the following classifications: regular bartenders, buspersons, food and beverage servers, stewards, cooks, second cooks, cafeteria attendants, cook helpers, food and beverage utility persons, warehouse persons, first cooks, garden manager, lead stewards, cashiers, host, and hostesses, room attendants, housepersons, laundry workers, floor care attendants, pool lifeguards, telephone operators, airport attendants, guest service attendants, bell captains, drivers, bellpersons, reservation clerks, recreational coordinators, telephone service lead persons, landscapers, lifeguards, equipment operators, maintenance workers, maintenance technicians, pool maintenance employees, beach attendants, painters, air-conditioning repair technicians and helpers, general maintenance technicians, preventative maintenance technicians, inventory clerks, housekeepers, Club Cala housekeepers, guest services attendants, Club Cala house persons, Club Cala laundry workers, messengers, maintenance utility workers and data entry clerks, engineering department employees employed by Wyndham Palmas del Mar Resort & Villas at the following facilities located at 170 Candelero Drive, Humacao, Puerto Rico, 00791 Palmas Inn, Hotel Candelero, Topo Coco Restaurant, Palm Terrace Restaurant Lounge, Villa Suites and Club Cala.
>
> EXCLUDED: The following personnel: food and beverage director, catering director, executive sous chef, food and beverage manager, banquet manager, storeroom manager, restaurant supervisor, steward supervisors, assistant banquet managers, chef de cuisine, banquet chef, sous chef, executive housekeeper, housekeeping managers, guest service manager, reservations manager, night manager, director villa manager, telephone service manager, activities manager, guest service supervisors, pool lifeguards supervisors, director property management, property manager, director of security, land-

On March 26, a petition was filed in Case 24–RD–418, seeking to decertify the Union as the exclusive collective-bargaining representative of the bargaining unit employees. On March 31, the Union filed an unfair labor practice charge in Case 24–CA–7642, alleging that the Respondent violated Section 8(a)(1) and (5) by requesting employees to sign a decertification petition and by engaging in dilatory, bad-faith bargaining.

On May 30, the Regional Director for Region 24 approved the withdrawal of those portions of the charge in Case 24–CA–7642 that alleged an unlawful refusal to bargain in violation of Section 8(a)(5). On June 5, the Regional Director approved the withdrawal of the decertification petition in Case 24–RD–418. Also on June 5, the Respondent entered into an informal Board settlement of the 8(a)(1) charge allegations in Case 24–CA–7642.[4] On July 2, pursuant to the settlement agreement, the Respondent posted a Board notice to employees stating that it would not "assist or solicit employees in the promotion, presentation, and circulation of a petition to decertify [the Union]"; that it would not "promise . . . employees increased wages and/or fringe benefits in exchange for their support of the decertification petition"; and that it would not "inform employees that [the Respondent] cannot be found liable for sponsoring a decertification petition." The 60-day notice-posting requirement continued until August 31.

On September 5, an attorney filed a decertification petition in Case 24–RD–424. The petition contained the signatures of 183 of the 255 bargaining unit employees. All signatures were dated between July 10 and August 23, i.e., during the 60-day notice-posting period.

On September 10, the attorney, accompanied by a group of employees, submitted a copy of the petition to the Respondent. On September 15, the Respondent's attorney notified the Union that the Respondent was withdrawing recognition and canceling all future bargaining sessions.

B. The Parties' Contentions

The General Counsel contends that the employee petition given to the Respondent on September 10 was tainted by unremedied unfair labor practices because the signatures on the petition were collected during the 60-day notice-posting period of the settlement agreement in Case 24–CA–7642. The General Counsel further contends that the Respondent could not lawfully rely on that tainted petition as objective evidence of its good-faith doubt concerning the Union's continuing majority status. Thus, the General Counsel argues, the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union based on that petition. Moreover, the General Counsel argues that the Respondent had not bargained for a reasonable period of time before withdrawing recognition, given that the Respondent recognized the Union in February 1997, and withdrew recognition only 7 months later.

The Respondent contends that it was privileged to withdraw recognition based on the petition signed by 183 bargaining unit employees, including 4 employee members of the bargaining committee. The Respondent asserts that the petition was not tainted, because there is no evidence of management coercion or involvement in the collection of the signatures. The Respondent asserts further that the settlement agreement specifically disavowed any wrongdoing on its part and therefore cannot have tainted the employee petition.

C. Discussion

As the parties recognize in their briefs, the Board has long held that an employer may not withdraw recognition from a union while there are unremedied unfair labor practices tending to cause employees to become disaffected from the union. *Olson Bodies*, 206 NLRB 779, 780 (1973). As one court has stated, a "company may not avoid the duty to bargain by a loss of majority status

---

scaping manager, maintenance manager, regional accounting manager, maintenance supervisor, assistant director of security, security supervisors, supervisor of beach lifeguards, engineering director, general supervisors, warehouse supervisors, paint supervisors, air-conditioning repair supervisors, golf operations director, golf course superintendent, golf pro, assistant golf pro, general manager Club Cala, housekeeping managers, sales manager, real estate customer service vice president of Palmas del Mar Utilities, field operations manager, accounting manager, purchasing manager, warehouse supervisors, vice president real estate sales and marketing, real estate sales manager, casino employees, accounting department employees, secretaries to the director of villa manager, administrative assistant to the director of property manager, secretary to assistant to the director of security, administrative assistant to the director of engineering, time share sales person Club Cala, secretary to the general manager Club Cala, secretary to vice president Palmas del Mar Utilities, materials buyers, purchasing coordinator, secretary to the food and beverage director, secretary to the director of housekeeping, secretary to the director of golf operations, human resources director, employment clerk, human resources information service coordinator, benefits administrator, nurse, compensation and benefits manager, employment manager, employment coordinator, president, secretary to the president, vice president development, secretary to the vice president development, vice president administration, secretary to the vice president administration, vice president resort operations, secretary to the vice president resort operations, comptroller, secretary to the comptroller, professional employees, office clericals, guards, temporary personnel, and supervisors as defined in the National Labor Relations Act.

[4] The settlement agreement included a nonadmission clause.

caused by its own unfair labor practices." *NLRB v. Williams Enterprises*, 50 F.3d 1280, 1288 (4th Cir. 1995).[5]

The issue then is one of causation. In cases involving a general refusal to recognize or bargain with an incumbent union, "the causal relationship between the unlawful act and subsequent loss of majority support may be presumed." *Lee Lumber,* 322 NLRB 175, 178 (1996), enfd. in relevant part 117 F.3d 1454 (D.C. Cir. 1997). In other cases, the Board has identified several factors as relevant to determining whether a causal relationship exists. These causation factors include the following: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp*., 271 NLRB 78, 84 (1984).

Of course, in this case, unlike *Master Slack*, the Union's unfair labor practice charge was resolved by an informal Board settlement agreement; there has been no finding by the Board (or admission by the Respondent) that an unfair labor practice was committed. Nevertheless, under the terms of the settlement agreement, the Respondent agreed to take precisely the sort of remedial action that the Board might have ordered to redress a violation of the Act: to post a notice for 60 days stating that it would not engage in unfair labor practices that were the subject of the Union's charge. The notice-posting provision is not a meaningless, pro forma requirement; to the contrary, it reflects an administrative determination by the Board that remedial action must be taken in order to safeguard the public interest and the rights of employees that the Act was designed to protect.[6]

In this respect, this case is analogous to *Douglas-Randall*, 320 NLRB 431 (1995), in which the Board addressed the issue of whether an employer's agreement to settle outstanding unfair labor practice charges warranted dismissal of a decertification petition. Overruling prior precedent, the Board held that "an employer's agreement to settle outstanding unfair labor practice charges and complaints by recognizing and bargaining with the union will require final dismissal, without provision for reinstatement, of a decertification petition or other petition challenging the union's majority status filed subsequent to the onset of the alleged unlawful conduct." Id. at 435.

The *Douglas-Randall* Board recognized that "a settlement agreement is not an admission or finding of unlawful conduct," but concluded that, "in order to give proper effect to such an agreement, the petition should be dismissed." Id. at fn. 9. In so concluding, the Board relied heavily on the Fourth Circuit's decision in *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740 (1951), cert. denied 342 U.S. 954 (1952), which the Board analyzed as follows:

> In enforcing the Board's Order in *Poole*, the Fourth Circuit explained that while different from a finding by the Board that an unfair labor practice has been committed, "a settlement agreement must . . . have definite legal effect and is quite different from a dismissal of the charges." 192 F.2d at 742. The court further stated that a "settlement agreement clearly manifests an administrative determination by the Board that some remedial action is necessary to safeguard the public interests intended to be protected by the National Labor Relations Act . . . ." Id. at 743. The court reasoned that a settlement agreement represents an agreement by the employer to undertake promptly the remedial action set out in the agreement rather than to be put to the trouble and expense of litigation before a trial examiner (now administrative law judge), the Board, and possibly the courts. The court observed that settlement agreements are important in the effective administration of the Act, and are used as a satisfactory means of closing cases involving unfair labor practice charges. The court remarked that there would be few of these agreements if the employer, after a solemn promise to bargain with the union, could immediately escape this obligation by questioning whether the union actually represents a majority of the bargaining unit; in that event, an employer could commit an unfair labor practice by refusing to bargain collectively, sign a settlement undertaking to bargain, and then attempt to have a new union certified when dissatisfaction with the old union arose among the employees because of the unfair labor practice. The court asserted that this should neither be permitted nor encouraged. If a settlement agreement is to have real force, the court stated, a reasonable time must be afforded in which a status fixed by the agreement is to operate. Otherwise, the settlement agreement might have little practical effect as an

[5] On March 29, 2001, the Board issued *Levitz*, 333 NLRB 717, in which it "reconsider[ed] whether, and under what circumstances, an employer may lawfully withdraw recognition unilaterally from an incumbent union." *Levitz*, however, has no bearing on our decision today because *Levitz* expressly limited its analysis "to cases where there have been no unfair labor practices committed that tend to undermine employees' support for unions." Id. at fn. 1. In addition, the Board held in *Levitz* that its analysis and conclusions in that case would only be applied prospectively. Id. at 723.

[6] See *Poole Foundry & Machine Co. v. NLRB,* 192 F.2d 740, 743 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952).

> amicable and judicious means to expeditious disposal of disputes arising under the terms of the Act. [320 NLRB at 432.]

In this case, unlike *Douglas-Randall,* the alleged unfair labor practices that were the subject of the settlement agreement did not include a failure to recognize and bargain with the Union, and the settlement agreement therefore did not require the Respondent to do so. Instead, it required the Respondent to post a notice for 60 days stating that it would not assist or solicit employees in support of a decertification petition, inform employees that it could not be held liable for sponsoring such a petition, or promise employees increased wages and benefits in return for their support of such a petition. But, regardless of whether it admitted or denied engaging in unlawful conduct, the Respondent agreed to a remedy. To treat the alleged conduct as if it had never occurred would, in these circumstances, be the same as permitting an employer to withdraw recognition from a union while unfair labor practices tending to cause employee disaffection remained unremedied. Our decisions rightly preclude that result, which is inconsistent with protecting genuinely free employee choice.

As we have observed, the notice-posting requirement is not a mere formality. Rather, the purpose of the posting requirement is "to provide sufficient time to dispel the harmful effects of the [allegedly unlawful] conduct," *Chet Monez Ford,* 241 NLRB 349, 351 (1979), and to ensure that employees are fully informed of their statutory rights. This requirement "is not to be taken lightly or whittled down." Ibid.

When the conduct covered by the settlement agreement is of such a nature that it would tend to erode employee support for the union, it is important that the remedial benefits of the posting not be "whittled down" by allowing a challenge to the union based on employee sentiment expressed during the remedial posting period. Otherwise, the lingering effects of the settled unfair labor practice conduct are likely to taint any employee disaffection from the union that may arise in the interim. Thus, the settlement agreement signed by the Respondent "must have definite legal effect and is quite different from a dismissal" of the Union's unfair labor practice charge. A settlement would have "little practical effect as an amicable and judicious means to expeditious disposal of disputes" if an employer could commit serious unfair labor practices, sign a settlement agreement with a nonadmission clause, and then avoid its duty to bargain by relying on the union's loss of majority support attributable to the employer's own unremedied conduct.

For these reasons, we reject our dissenting colleague's view and conclude that (absent a specific agreement to the contrary) settled unfair labor practice conduct, which leads to remedial action, should be subject to the same causation analysis as adjudicated conduct.[7] Thus, where, as here, an employer withdraws recognition from a union on the basis of an antiunion petition signed during the remedial notice-posting period prescribed by a settlement agreement, the *Master Slack* analysis is appropriate. Accordingly, we will apply the *Master Slack* factors to determine whether a causal relationship exists between the alleged unfair labor practices that led to the agreed-on remedy and the subsequent expression of employee disaffection with the Union.

As set forth above, the settlement agreement covered the following conduct by the Respondent:

> Soliciting employees to promote and circulate a petition to decertify the incumbent Union;
>
> Promising employees improved wages and benefits in exchange for their support for the decertification effort;
>
> Informing employees that the Respondent cannot be found liable for sponsoring the decertification petition.

With respect to the first *Master Slack* factor (lapse of time), the record indicates that the conduct that was the subject of the settlement agreement occurred in March, and the signatures on the antiunion petition were collected between July 10 and August 23. However, in the circumstances of this case, we find that the passage of a mere 5 months would not reasonably dissipate the effects of the Respondent's conduct.

Significantly, when the signatures on the petition were collected, the alleged unfair labor practices had not yet been remedied. Although the settlement agreement required the Respondent to post the notice for 60 days, only 1 week of the posting period had elapsed when the initial signatures were secured.

Furthermore, the Respondent's settled conduct occurred in the context of an "unsettling transition" between employers. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 39 (1987).[8] Because "employees initially will be concerned primarily with maintaining their new jobs," id. at 40, solicitations by their new employer to repudiate

[7] We also reject our dissenting colleague's contention that our decision will have the effect of discouraging settlement agreements. Parties generally enter into such agreements in order to end labor disputes without the delay and expense of litigation. See *Independent Stave Co.*, 287 NLRB 740, 741 (1987). It is speculative at best to suggest that an employer would hesitate to settle pending unfair labor practice charges out of fear that if a hypothetical antiunion petition were to circulate during the 60-day posting period, the employer might not be able to rely on it to withdraw recognition from the union.

[8] As stated, the Union was certified in 1995 as the representative of a unit of employees of a predecessor employer. In February 1997, the Respondent recognized the Union and began negotiations.

their bargaining representative during this sensitive time period can reasonably be expected to have a lasting effect.

With respect to the second *Master Slack* factor (the nature of the conduct), so far as the record shows, it was the Respondent's own settled conduct which first sparked employee dissatisfaction with the Union in March and which resulted in the filing of the initial decertification petition. After this petition was withdrawn in June, it is hardly surprising that a second petition would surface in July because, as discussed above, the very conduct that had given rise to the first petition had not been remedied. In sum, there is an exceedingly close nexus between the nature of the Respondent's settled conduct (soliciting employees to sign decertification petition 1) and the expression of employee dissatisfaction on which the Respondent based its withdrawal of recognition (decertification petition 2).

We now turn to the final two *Master Slack* factors, which focus on the effect of the conduct on protected employee activities. By soliciting employees to promote a decertification effort and promising them improved wages and benefits in exchange for their doing so, the Respondent sought to undermine the Union's authority generally and to influence the employees to reject the Union as their bargaining representative. See *Royal Motor Sales*, 329 NLRB 760, 761 (1999) (suggesting to employee that he sign a petition to get rid of union and promising him a bonus if he would circulate it among other employees "clearly likely to undermine support for a union"), 2 Fed.Appx 1, 2000 WL59043 (D.C. Cir. 2001). Further, the Respondent's settled conduct is of a character that reasonably tends to have a negative effect on union membership. "Promises of enhanced benefits in the absence of a union tend to discourage union activity because such promises send the unmistakable message that union representation is not only unnecessary, but that it is an obstacle, as opposed to a means, to achieving higher wages and benefits." *Bridgestone/Firestone, Inc*., 332 NLRB 575 (2000).

For all of these reasons, we find that the Respondent's conduct covered by the settlement agreement would reasonably have led to employee disaffection from the Union and would have undermined the Union's support among employees. Under these circumstances, as discussed above, the Respondent could not lawfully challenge the Union's majority status on the basis of the antiunion petition that was signed during the 60-day posting period. Therefore, we conclude that by withdrawing recognition from the Union on September 15, and by refusing to bargain with it, the Respondent violated Section 8(a)(5) and (1) of the Act.[9]

2. For the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees'Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Id. at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the employer's withdrawal of recognition. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

Moreover, employees have not yet had an opportunity to assess for themselves, without any undue influence

[9] In light of this conclusion, it is unnecessary to address the General Counsel's alternative argument that even if the petition had not been tainted by the alleged unfair labor practices, the Respondent had not bargained for a reasonable period of time before withdrawing recognition from the Union. See *St. Elizabeth's Manor*, 329 NLRB 341 (1999).

from the Respondent, the Union's effectiveness as collective-bargaining representative. After only 1 month of bargaining with the Union for an initial contract, the Respondent began promoting a decertification effort, which led to the filing of the petition in Case 24–RD–418 on March 26, 1997. That decertification petition and the related unfair labor practice charge in Case 24–CA–7642 concerning the Respondent's involvement with that petition remained pending until the execution of the settlement agreement in June. The following month, another decertification effort began, resulting in the filing of a petition in Case 24–RD–424 on September 5. Ten days later, the Respondent withdrew recognition from the Union. In light of these events, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees will be able to fairly decide for themselves whether they wish to continue to be represented by the Union or adopt some other arrangement.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement.[10] Such a result would be particularly unfair in circumstances such as those here, where litigation of the Union's charges took several years and the Respondent's unfair labor practice was of a continuing nature and was likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Wyndham Palmas del Mar Resort and Villas, Humacao, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully withdrawing recognition from Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, HEREIU, AFL–CIO and refusing to bargain with it as the exclusive collective-bargaining representative of the employees employed in the unit described below in paragraph 2(a).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> INCLUDED: All regular fulltime and regular part-time employees in the following classifications: regular bartenders, buspersons, food and beverage servers, stewards, cooks, second cooks, cafeteria attendants, cook helpers, food and beverage utility persons, warehouse persons, first cooks, garden manager, lead stewards, cashiers, host, and hostesses, room attendants, housepersons, laundry workers, floor care attendants, pool lifeguards, telephone operators, airport attendants, guest service attendants, bell captains, drivers, bellpersons, reservation clerks, recreational coordinators, telephone service lead persons, landscapers, lifeguards, equipment operators, maintenance workers, maintenance technicians, pool maintenance employees, beach attendants, painters, air-conditioning repair technicians and helpers, general maintenance technicians, preventative maintenance technicians, inventory clerks, housekeepers, Club Cala housekeepers, guest services attendants, Club Cala house persons, Club Cala laundry workers, messengers, maintenance utility workers and data entry clerks, engineering department employees

[10] As the Board held in *Lee Lumber*, when an employer unlawfully refuses to recognize an incumbent union, any employee disaffection from the union arising during the course of that refusal will be presumed to result from the refusal. The employer normally can rebut that presumption only by showing that it resumed recognizing the union and bargained for a reasonable time, without committing further serious unfair labor practices, before the disaffection arose. 322 NLRB 178. Thus, the only reliable remedy for the Respondent's withdrawal of recognition is an order requiring the Respondent to recognize and bargain with the Union for a reasonable time before the Union's majority status can be questioned.

employed by Wyndham Palmas del Mar Resort & Villas at the following facilities located at 170 Candelero Drive, Humacao, Puerto Rico, 00791 Palmas Inn, Hotel Candelero, Topo Coco Restaurant, Palm Terrace Restaurant Lounge, Villa Suites and Club Cala.

EXCLUDED: The following personnel: food and beverage director, catering director, executive sous chef, food and beverage manager, banquet manager, storeroom manager, restaurant supervisor, steward supervisors, assistant banquet managers, chef de cuisine, banquet chef, sous chef, executive housekeeper, housekeeping managers, guest service manager, reservations manager, night manager, director villa manager, telephone service manager, activities manager, guest service supervisors, pool lifeguards supervisors, director property management, property manager, director of security, landscaping manager, maintenance manager, regional accounting manager, maintenance supervisor, assistant director of security, security supervisors, supervisor of beach lifeguards, engineering director, general supervisors, warehouse supervisors, paint supervisors, air-conditioning repair supervisors, golf operations director, golf course superintendent, golf pro, assistant golf pro, general manager Club Cala, housekeeping managers, sales manager, real estate customer service vice president of Palmas del Mar Utilities, field operations manager, accounting manager, purchasing manager, warehouse supervisors, vice president real estate sales and marketing, real estate sales manager, casino employees, accounting department employees, secretaries to the director of villa manager, administrative assistant to the director of property manager, secretary to assistant to the director of security, administrative assistant to the director of engineering, time share sales person Club Cala, secretary to the general manager Club Cala, secretary to vice president Palmas del Mar Utilities, materials buyers, purchasing coordinator, secretary to the food and beverage director, secretary to the director of housekeeping, secretary to the director of golf operations, human resources director, employment clerk, human resources information service coordinator, benefits administrator, nurse, compensation and benefits manager, employment manager, employment coordinator, president, secretary to the president, vice president development, secretary to the vice president development, vice president administration, secretary to the vice president administration, vice president resort operations, secretary to the vice president resort operations, comptroller, secretary to the comptroller, professional employees, office clericals, guards, temporary personnel, and supervisors as defined in the National Labor Relations Act.

(b) Within 14 days after service by the Region, post at its Humacao, Puerto Rico facilities copies of the attached notice marked "Appendix."[11] Copies of the notice in Spanish and in English, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 15, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN HURTGEN, dissenting.

On September 5, 1997, Respondent was presented with a petition in which 183 (of 255) unit employees clearly stated that they did not wish to be represented by the Union. Employees had signed the petition on dates between July 10 and August 3. Contrary to my colleagues, I do not agree that the General Counsel has established that the employee disaffection from the Union was caused by any unfair labor practices. Accordingly, Respondent was privileged to withdraw recognition from the Union based on that disaffection.

My colleagues analyze the case under *Master Slack*, 271 NLRB 78 (1984), in order to determine whether the Respondent's conduct caused the disaffection. The case is clearly inapposite. The *Master Slack* analysis is used where proven unfair labor practices are followed by an employee disaffection from the Union. The *Master Slack* analysis determines whether the unfair labor practices caused the disaffection. In the instant case, *there are no proven unfair labor practices*. There is only an informal settlement agreement with a non-admission clause. Thus, *Master Slack* has no relevance. Obvi-

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ously, one cannot show that unlawful conduct has caused a disaffection if no unlawful conduct is shown.

My colleagues repeatedly refer to "the not yet fully remedied unfair labor practices". They ignore the fact that *no* unfair labor practices have been established. Similarly, my colleagues warn against "treat[ing] the alleged conduct as if it had never occurred." They then, in the same sentence, treat the conduct as if it did occur, i.e., they refer to "unfair labor practices." The fact is that there is a presumption of innocence, and there is no showing that any unfair labor practice has occurred.

My colleagues unnecessarily complicate the case. Here, the Respondent entered into a settlement agreement regarding alleged 8(a)(1) violations. In the absence of any evidence to the contrary, it must be presumed that the Respondent complied with that agreement, including the notice-posting provision. The employees collected sufficient signatures during the 60-day period of the notice posting to support the filing of a decertification petition. There is no showing that the Respondent had any responsibility for this decertification effort. Yet, the majority extends the holding in *Master Slack* to cover a situation where the Respondent has not been found to violate the Act. By taking this approach, my colleagues have acted detrimentally in two fundamental ways: (1) they decrease the likelihood that employers will voluntarily enter into settlement agreements that dispose of unfair labor practice charges and (2) they interfere with employees' Section 7 right to decide whether they desire union representation.

With respect to 1 above, I agree with my colleagues that parties usually settle cases in order to get the dispute behind them. However, in the instant case, my colleagues seek to revive the dispute by using the settled conduct to taint an otherwise valid petition. Further, the settlement agreement here provided that Respondent did not admit that it committed any unfair labor practices. My colleagues now seek to use the settled conduct as if it were an unfair labor practice, i.e., to taint an otherwise valid petition. The use of a settlement, contrary to its terms, is strange jurisprudence and can only deter respondents from entering into settlements.

Poole Foundry, 192 F.2d 740 (4th Cir. 1951), is also off the mark. In that case, the employer agreed to recognize the union, as part of a settlement agreement. The Board reasoned that an employer who agrees to recognize and bargain with the union (as part of a settlement) cannot then turn around and promptly withdraw recognition. By contrast, in the instant case, the Respondent did not agree to recognize and bargain with the Union. (The 8(a)(5) charge was previously withdrawn and was thus not part of the settlement.) Respondent agreed to remedy certain alleged 8(a)(1) conduct, and there is no claim that Respondent breached that agreement.[1]

My colleagues speak of the importance of remedial notices. However, there is no showing that any provision of the notice or the settlement itself has been breached.

In short, there is no showing that the employee disaffection was tainted in any way. Nor is there a showing that Respondent breached an agreement to recognize and bargain. Indeed, there is no showing that Respondent breached the settlement at all. In these circumstances the employees' Section 7 rights clearly prevail. I would honor them.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully withdraw recognition from Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, HEREIU, AFL–CIO, and unlawfully refuse to bargain with it as the exclusive collective-bargaining representative of the employees employed in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> INCLUDED: All regular fulltime and regular part-time employees in the following classifications: regular bartenders, buspersons, food and beverage servers,

[1] *Douglas-Randall,* 320 NLRB 431 (1995), is even further off the mark. In that case, the sequence was the reverse of the instant case and *Poole*. That is, the decertification petition *preceded* the settlement in *Douglas-Randall*. I disagree with *Douglas-Randall*. See *Supershuttle of Orange County*, 330 NLRB 1016 (2000). In any event, the precedent is not relevant here.

stewards, cooks, second cooks, cafeteria attendants, cook helpers, food and beverage utility persons, warehouse persons, first cooks, garden manager, lead stewards, cashiers, host, and hostesses, room attendants, housepersons, laundry workers, floor care attendants, pool lifeguards, telephone operators, airport attendants, guest service attendants, bell captains, drivers, bellpersons, reservation clerks, recreational coordinators, telephone service lead persons, landscapers, lifeguards, equipment operators, maintenance workers, maintenance technicians, pool maintenance employees, beach attendants, painters, air-conditioning repair technicians and helpers, general maintenance technicians, preventative maintenance technicians, inventory clerks, housekeepers, Club Cala housekeepers, guest services attendants, Club Cala house persons, Club Cala laundry workers, messengers, maintenance utility workers and data entry clerks, engineering department employees employed by Wyndham Palmas del Mar Resort & Villas at the following facilities located at 170 Candelero Drive, Humacao, Puerto Rico, 00791 Palmas Inn, Hotel Candelero, Topo Coco Restaurant, Palm Terrace Restaurant Lounge, Villa Suites and Club Cala.

EXCLUDED: The following personnel: food and beverage director, catering director, executive sous chef, food and beverage manager, banquet manager, storeroom manager, restaurant supervisor, steward supervisors, assistant banquet managers, chef de cuisine, banquet chef, sous chef, executive housekeeper, housekeeping managers, guest service manager, reservations manager, night manager, director villa manager, telephone service manager, activities manager, guest service supervisors, pool lifeguards supervisors, director property management, property manager, director of security, landscaping manager, maintenance manager, regional accounting manager, maintenance supervisor, assistant director of security, security supervisors, supervisor of beach lifeguards, engineering director, general supervisors, warehouse supervisors, paint supervisors, air-conditioning repair supervisors, golf operations director, golf course superintendent, golf pro, assistant golf pro, general manager Club Cala, housekeeping managers, sales manager, real estate customer service vice president of Palmas del Mar Utilities, field operations manager, accounting manager, purchasing manager, warehouse supervisors, vice president real estate sales and marketing, real estate sales manager, casino employees, accounting department employees, secretaries to the director of villa manager, administrative assistant to the director of property manager, secretary to assistant to the director of security, administrative assistant to the director of engineering, time share sales person Club Cala, secretary to the general manager Club Cala, secretary to vice president Palmas del Mar Utilities, materials buyers, purchasing coordinator, secretary to the food and beverage director, secretary to the director of housekeeping, secretary to the director of golf operations, human resources director, employment clerk, human resources information service coordinator, benefits administrator, nurse, compensation and benefits manager, employment manager, employment coordinator, president, secretary to the president, vice president development, secretary to the vice president development, vice president administration, secretary to the vice president administration, vice president resort operations, secretary to the vice president resort operations, comptroller, secretary to the comptroller, professional employees, office clericals, guards, temporary personnel, and supervisors as defined in the National Labor Relations Act.

WYNDHAM PALMAS DEL MAR RESORT AND VILLAS